84-1162

No.....

Office Supreme Court U.S.
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In The
# Supreme Court of the United States
October Term, 1984

BURLINGTON NORTHERN RAILROAD COMPANY,

*Petitioner,*

v.

GAIL L. CLAY, individually, as Personal Representative of the Estate of Norman Lee Clay, and as Guardian of Kari Lynn Clay and Boyd Lee Clay,

*Respondents.*

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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## STATEMENT OF QUESTIONS PRESENTED

1. Whether a conflict between the United States Court of Appeals for the Seventh Circuit and the United States Court of Appeals for the Tenth Circuit should be resolved in favor of the Petitioner whose appeal was dismissed on purely procedural grounds when it had filed a Notice of Appeal fifteen (15) days after the District Court entered its Order amending judgment but before certification by the District Court pursuant to Federal Rule of Civil Procedure 54(b).

2. Whether the United States Court of Appeals for the Tenth Circuit erred in holding that Federal Rule of Appellate Procedure 4(a) (2) precludes the right of appeal where a Notice of Appeal is filed before certification under Federal Rule of Civil Procedure 54(b).

3. Whether the United States Court of Appeals for the Tenth Circuit erred when it refused to treat Petitioner's Memorandum Brief in Opposition to Summary Dismissal as a timely Notice of Appeal following the District Court's certification pursuant to Federal Rule of Civil Procedure 54(b).

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No.....

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BURLINGTON NORTHERN RAILROAD COMPANY,

*Petitioner,*

v.

GAIL L. CLAY, individually, as Personal Representative of the Estate of Norman Lee Clay, and as Guardian of Kari Lynn Clay and Boyd Lee Clay,

*Respondents.*

—o—

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

—o—

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States.

Burlington Northern Railroad Company,[1] the petitioner herein, prays that a Writ of Certiorari issue to

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[1]In compliance with Supreme Court Rule 28(1), Burlington Northern Railroad Company's subsidiaries and affiliates have been included in a footnote to the Appearance of Donald E. Engle.

review the Order and Judgment of the United States Court of Appeals for the Tenth Circuit entered on August 22, 1984 and the Tenth Circuit's denial of Burlington Northern's Petition for Rehearing entered on October 31, 1984.

—o—

## ORDER AND JUDGMENT BELOW

The Order and Judgment dismissing Burlington Northern Railroad Company's appeal of the *Gail L. Clay, et al.* judgment has been included in the Appendix. (App. 1-3)[2]. The Tenth Circuit denied Burlington Northern's Petition for Rehearing, without opinion, on October 31, 1984. (App. 3).

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## JURISDICTIONAL STATEMENT

The United States Court of Appeals for the Tenth Circuit filed its Order and Judgment on August 22, 1984. (App. 1-3). On October 31, 1984, the Tenth Circuit denied Burlington Northern's Petition for Rehearing. (App. 3). The jurisdiction of this court is invoked under the provisions of Title 28, § 2101(c) of the United States Code.

—o—

[2]In this Petition, references to the Appendix will be abbreviated as "App." followed by a page number.

## RULES INVOLVED

The rules involved in the present case are Federal Rule of Civil Procedure 54(b) and Federal Rules of Appellate Procedure 4(a) (2) & (4).

Federal Rule of Civil Procedure 54(b) states:

> Judgment Upon Multiple Claims or Involving Multiple Parties. When more than one claim for relief is presented in an action, whether as a claim, counterclaim, cross-claim, or third-party claim, or when multiple parties are involved, the court may direct the entry of a final judgment as to one or more but fewer than all of the claims or parties only upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment. In the absence of such determination and direction, any order or other form of decision, however designated, which adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties shall not terminate the action as to any of the claims or parties, and the order or other form of decision is subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties.

Federal Rule of Appellate Procedure 3(c) states:

> Content of the Notice of Appeal. The notice of appeal shall specify the party or parties taking the appeal; shall designate the judgment, order or part thereof appealed from; and shall name the court to which the appeal is taken. Form 1 in the Appendix of Forms is a suggested form of a notice of appeal. An appeal shall not be dismissed for informality of form or title of the notice of appeal.

Federal Rule of Appellate Procedure 4(a) (2) states:

> Except as provided in (a) (4) of this Rule 4, a notice of appeal filed after the announcement of a

decision or order but before the entry of the judgment or order shall be treated as filed after such entry and on the day thereof.

Federal Rule of Appellate Procedure 4(a) (4) states:

> If a timely motion under the Federal Rules of Civil Procedure is filed in the district court by any party; (i) for judgment under Rule 50(b); (ii) under Rule 52(b) to amend or make additional findings of fact, whether or not an alteration of the judgment would be required if the motion is granted; (iii) under Rule 59 to alter or amend the judgment; or (iv) under Rule 59 for a new trial, the time for appeal for all parties shall run from the entry of the order denying a new trial or granting or denying any other such motion. A notice of appeal filed before the disposition of any of the above motions shall have no effect. A new notice of appeal must be filed within the prescribed time measured from the entry of the order disposing of the motion as provided above. No additional fees shall be required for such filing.

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## STATEMENT OF THE CASE

This is a wrongful death action under the provisions of the Federal Employers' Liability Act, 45 U.S.C. § 51, *et seq.*, against Burlington Northern Railroad Company (hereinafter referred to as "Burlington" or "Petitioner") in the United States District Court for the District of Colorado, brought by the widows of two of the defendant's employees, engineer Darrold Floyd Wilson and head brakeman Norman Lee Clay, who died when a railroad train they were operating went into a stream as a result of a flash flood which washed out a bridge they were to cross.

Following trial to jury, the District Court, in accordance with a special verdict, entered judgment on June 10, 1983, in favor of decedent Wilson in the amount of $1,192,000, reduced by Wilson's contributory negligence (75%) to a net verdict of $250,048, and further entered judgment for the decedent Clay in the amount of $690,046 reduced by his contributory negligence (75%) to a net verdict of $172,510. (App. 4-6).

The District Court, on November 14, 1983, pursuant to plaintiff's post-trial motions, amended the Clay judgment by eliminating the contributory negligence finding and reinstating the entire $690,046 jury award. The District Court granted a new trial to Wilson. (App. 6-10). On November 15, 1983, an amended judgment was entered. (App. 11-12).

Burlington's Notice of Appeal from the District Court's Order and Judgment was filed on December 1, 1983. (App. 12-13).

On December 19, 1983, Burlington filed its Motion for Entry of Final Judgment under Rule 54(b) (App. 13-14), and on February 3, 1984, Plaintiff Clay filed a similar motion.

On March 20, 1984, the United States Court of Appeals for the Tenth Circuit, by memorandum letter, addressed the following question to counsel for appellant and appellee: "Whether the November 15, 1983 Amended Judgment is final for purposes of appeal? *See* Rule 54(b), Fed.R. Civ.P.; *Golden Villa Spa, Inc. v. Health Industries, Inc.*, 549 F.2d 1363 (10th Cir. 1977)." (App. 15-16).

On March 29, 1984, the District Court entered its Order *nunc pro tunc* certifying that the judgment in favor

of Plaintiff Clay was final and there was no just reason for delay of an appeal. (App. 16-19). In accordance with the Court's certification, a Second Amended Judgment as to the Plaintiff Clay was entered on April 2, 1984. (App. 19-21).

The following day, on April 3, 1984, Burlington filed its Memorandum Brief in Opposition to Summary Dismissal (App. 22-23) in response to the Tenth Circuit's March 20th request for briefs. (App. 15-16). In that Memorandum Brief to the Tenth Circuit, Burlington emphasized that the District Court's Order made the Amended Judgment *nunc pro tunc* to June 10, 1983.

Approximately 141 days later, on August 22, 1984, the Tenth Circuit, by Order and Judgment, dismissed Burlington's appeal for failing to file another Notice of Appeal from the April 2, 1984 Second Amended Judgment. (App. 1-3 and 19-21).

Petition for Rehearing was denied on October 31, 1984, without opinion. (App. 3).

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## REASONS FOR GRANTING THIS WRIT

### I.

**This case squarely addresses a conflict in law between the Seventh Circuit, which has held that a Second Notice of Appeal is unnecessary to vest appellate jurisdiction in the Circuit Court after a Rule 54(b) certification, and the Tenth Circuit**

**which has expressly disagreed by holding that any Notice of Appeal filed prior to a Rule 54(b) certification is premature and a Second Notice of Appeal is necessary to vest jurisdiction.**

In this action, the United States Court of Appeals for the Tenth Circuit summarily dismissed Burlington's appeal on the merits when Burlington did not file a pleading denominated "Notice of Appeal" or "Second Notice of Appeal" following the trial court's certification pursuant to Rule 54(b) of the Federal Rules of Civil Procedure. On December 1, 1983, Burlington Northern did file a first Notice of Appeal (App. 12-13) from the November 15, 1983 Amended Judgment. (App. 11-12). Following the filing of that Notice of Appeal (App. 12-13), both parties moved for entry of Final Judgment under Federal Rule of Civil Procedure 54(b). On March 20, 1984, the United States Court of Appeals for the Tenth Circuit sent counsel a Notice of Possible Summary Dismissal for Lack of Jurisdiction, and requested simultaneous briefs on the issue of whether the November 15, 1983 Amended Judgment was final. (App. 15-16). On March 29, 1984, the trial court certified the judgment *nunc pro tunc* to June 10, 1983 pursuant to Federal Rule of Civil Procedure 54(b). (App. 16-19). On April 3, 1984, Burlington filed the requested Brief in Opposition to Summary Dismissal (App. 22-23), thus evidencing its continuing intent to proceed with its appeal after the trial court had pronounced its Rule 54(b) certification. More than four months later, the United States Court of Appeals for the Tenth Circuit dismissed Burlington's appeal for lack of jurisdiction. (App. 1-3).

In *Local P-171, Amalgamated Meat Cutters and Butcher Workmen v. Thompson Farms Co.*, 642 F.2d 1065 (7th

Cir. 1981), the Seventh Circuit reached precisely the opposite result, holding that a Federal Rule of Civil Procedure 54(b) certification secured after the notice of appeal acts *nunc pro tunc* to the date the notice of appeal was filed. The Tenth Circuit, both in its dismissal of Petitioner's appeal and its decision in *A. O. Smith Corp. v. Sims Consol. Ltd.*, 647 F.2d 118, 120 (10th Cir. 1981), specifically disagrees with the Seventh Circuit's holding.

In the present case, the trial court, in its Order of March 29, 1984, expressly made its Amended Judgment of November 15, 1983, a final order, stating:

> My order dated November 14, 1983, which restored the full amount of the jury verdict, should have indicated that the amended judgment be entered *nunc pro tunc* to June 10, 1983. Pursuant to Fed.R.Civ.P. 60(a), I now order that the judgment entered November 15, 1983, be amended to reflect that such judgment was to be effective *nunc pro tunc* to June 10, 1983.
>
> • • •
>
> Finally, the parties have submitted Cross-Motions for Fed.R.Civ.P. 54(b) certification of the plaintiff Clay's judgment against the defendant. Pursuant to that rule, I find that there is no just reason for delay and *I direct the Clerk of the Court to enter as a final judgment the amended judgment specified in this order.* (Emphasis added). (App. 16-19).

Since the trial court specifically made its order *nunc pro tunc,* Petitioner's Notice of Appeal from the November 15, 1983 Amended Judgment was effective and appropriately filed.

The Seventh Circuit's rationale in *Local P-171, Amalgamated Meat Cutters and Butcher Workmen v. Thompson Farms Co., supra,* is supported by the reasoning of

this Court in *Foman v. Davis,* 371 U.S. 178 (1962), where the Court stated:

> It is too late in the day and entirely contrary to the spirit of the Federal Rules of Civil Procedure for decisions on the merits to be avoided on the basis of such mere technicalities. "The Federal Rules reject the approach that pleading is a game of skill in which one misstep by counsel may be decisive to the outcome and accept the principle that the purpose of pleading is to facilitate a proper decision on the merits." . . . The Rules themselves provide that they are to be construed "to secure the just, speedy, and inexpensive determination of every action." Rule 1. *Id.* at 181-82.

That same reasoning appears in the Notes of the Advisory Committee on Appellate Rules commenting on the 1979 Amendment to Rule 4(a) (2) of the Rules of Appellate Procedure where the Committee says:

> Note to Subdivision (a) (2). The proposed amendment to Rule 4(a) (2) would extend to civil cases the provisions of Rule 4(b), dealing with criminal cases, designed to avoid the loss of the right to appeal by filing the notice of appeal prematurely. Despite the absence of such a provision in Rule 4(a) the courts of appeals quite generally have held premature appeals effective. See, e.g., *Matter of Grand Jury Empanelled Jan. 21, 1975,* 541 F.2d 373 (3d Cir. 1976); *Hodge v. Hodge,* 507 F.2d 87 (3d Cir. 1976); *Song Jook Suh v. Rosenberg,* 437 F.2d 1098 (9th Cir. 1971); *Ruby v. Secretary of the Navy,* 365 F.2d 385 (9th Cir. 1966); *Firchau v. Diamond Nat'l Corp.,* 345 F.2d 469 (9th Cir. 1965).
>
> The proposed amended rule would recognize this practice but make an exception in cases in which a post trial motion has destroyed the finality of the judgment. See Note to Rule 4(a) (4) below. Rule 4(a) (2)

Rules of Appellate Procedure, Advisory Committee Note to Subdivision (a) (2).

The Tenth Circuit's dismissal here precludes a decision on the merits of Petitioner's appeal; and, instead, substitutes a technical dismissal in contravention of the spirit of the Rules as announced in *Foman v. Davis, supra,* and contrary to the considered reasoning of the Seventh Circuit in *Amalgamated Meat Cutters, supra,* and the commentary of the Advisory Committee on Appellate Rules.

The only result of such a technical dismissal is injustice, particularly where, as here, both parties, by their Motions for Entry of Final Judgment, evidenced *de facto* recognition that the Amended Judgment of November 15, 1983 (App. 11-12) was final. The trial court concurred in that conclusion by including the earlier quoted *nunc pro tunc* language in its March 29, 1984 Order. (App. 16-19).

## II.

**The Tenth Circuit erred in refusing to treat Petitioner's Memorandum Brief in Opposition to Summary Dismissal as evidence of Petitioner's intent to pursue its appeal or as a Second Notice of Appeal following the District Court's certification pursuant to Federal Rule of Civil Procedure 54(b).**

Even if the Tenth Circuit correctly held that Petitioner's Notice of Appeal was premature, that defect was cured by the Memorandum Brief which Burlington filed in opposition to Summary Dismissal. (App. 22-23). That Memorandum Brief was filed on April 3, 1984, five days after the trial court entered its Order making the Amended Judgment of November 15, 1983 final (App. 16-19), and the day after entry of the Second Amended Judgment. (App. 19-21). That Memorandum Brief, if it did nothing

else, reasserted Petitioner's intent to pursue its appellate rights after entry of the Second Amended Judgment.

Federal Rule of Appellate Procedure 3(c) sets forth the three necessary requisites for a notice of appeal. The first requirement is that the party taking the appeal be specified. In the Memorandum Brief, Petitioner identified itself as the appellant in the caption, title, and body. (App. 22-23). The second requirement is that the judgment, order or part thereof appealed from be designated. In its Memorandum Brief, Petitioner stated: " . . . in its attached Order dated March 29, 1984, [the District Court] designated its amended judgment entered November 15, 1983, as a final judgment for purposes of appeal pursuant to Rule 54(b), Fed. R. Civ. P. The Court's Order is attached as Exhibit A. The corrected final judgment issued April 2, 1984, is attached hereto as Exhibit B." Thus, the judgment was designated as required. Finally, Federal Rule of Appellate Procedure 3(c) requires appellant to name the court to which the appeal is taken. That final requirement is also met since Petitioner's Memorandum in Opposition to Summary Dismissal is addressed to the United States Court of Appeals for the Tenth Circuit, and was in response to the Tenth Circuit's request. (App. 22-23). That pleading, filed after the Second Amended Judgment was entered, meets each of the criteria set forth in Federal Rule of Appellate Procedure 3(c) regarding the contents of the notice of appeal.

The final sentence of Federal Rule of Appellate Procedure 3(c) states: "An appeal shall not be dismissed for informality of form or title of the notice of appeal." The Notes of Advisory Committee on Appellate Rules comment on that sentence, stating in pertinent part:

1979 AMENDMENT

> Note to Subdivision (c). The proposed amendment would add the last sentence. Because of the fact that the timely filing of the notice of appeal has been characterized as jurisdictional (*See,* e.g., *Brainerd v. Beal,* (CA7th, 1974) 498 F.2d 901, in which the filing of a notice of appeal one day late was fatal), it is important that the right to appeal not be lost by mistakes of mere form. In a number of decided cases it has been held that so long as the function of notice is met by the filing of a paper indicating an intention to appeal, the substance of the rule has been complied with. *See,* e.g., *Cobb v. Lewis,* (CA5th, 1974) 488 F.2d 41; *Holley v. Capps* (CA5th, 1972) 468 F.2d 1366. The proposed amendment would give recognition to this practice.

The purpose behind the Rule and the Advisory Committee Notes clearly seems to be to avoid deprivation of appellate rights where the intent to appeal is manifest. The result in this case has been just the opposite. Petitioner has, in fact, been deprived of its right to a hearing on the merits. Even in the opinions relied upon by the Tenth Circuit, that drastic result was not attained.

In *A. O. Smith Corporation v. Sims Consolidated Ltd., supra,* and in *Lamp v. Andrus,* 657 F.2d 1167 (10th Cir. 1981), there was a speedy determination by the Tenth Circuit within the time remaining for appeal. For example, in *A. O. Smith Corporation v. Sims Consolidated Ltd., supra,* the court said that it:

> . . . entered an order on February 23, 1981, dismissing Smith's attempted appeal of October 10, 1980, with notice to the parties that this opinion would follow. *The purpose of this procedure was to give the appellant an opportunity to timely cure the defect.* 647 F.2d at 121. (Emphasis added.)

It further observed that:

> . . . this is not a situation in which procedural technicality forever forecloses the appellant from having an Appellate Court consider the merits of the case. (Id.)

The opposite is true here. Although Burlington's Memorandum Brief in Opposition to Summary Dismissal was filed April 3, 1984 (App. 22-23), the Order and Judgment Dismissing Appeal for Lack of Jurisdiction was not entered until August 22, 1984 (App. 1-3), thus foreclosing Petitioner from having the Tenth Circuit consider the merits of its appeal.

———o———

## CONCLUSION

For the foregoing reasons, Petitioner, Burlington Northern Railroad Company, respectfully requests this Court grant its Petition for a Writ of Certiorari to review the decision of the United States Court of Appeals for the Tenth Circuit.

Respectfully submitted,

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*Attorney for Petitioner*

# APPENDIX

## UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

No. 83-2584
(D.C. No. 81-C-1385)
(D. Colo.)

CHARLOTTE LOUISE WILSON, individually, as Personal Representative of the Estate of Darold Floyd Wilson, and as Guardian of Jolene Kay Wilson, Craig Allen Wilson and Terry Todd Wilson and GAIL L. CLAY, individually, as Personal Representative of the Estate of Norman Lee Clay, and as Guardian of Karri Lynn Clay and Boyd Lee Clay,

Plaintiffs-Appellees,

v.

BURLINGTON NORTHERN RAILROAD COMPANY,

Defendant-Appellant.

## ORDER AND JUDGMENT

(Filed August 22, 1984)

Before BARRETT, McKAY and LOGAN, Circuit Judges.

In accordance with 10th Cir. R. 9(e) and Fed. R. App. P. 34(a), this appeal came on for consideration on the briefs and record on appeal.

It appears that on June 10, 1983, the district court entered judgment, on the jury's verdict, in favor of both plaintiffs and against the defendant. Within the time allowed by the rules, both plaintiffs requested that the judgment be altered or amended or, in the alternative, that they be allowed a new trial. That motion rendered the June 10 judgment nonfinal within the meaning of 28 U.S.C. § 1291.

*See* Fed. R. App. P. 4(a)(4). On November 14, 1983, the district court granted the motion to amend in favor of plaintiff Clay. On the following day, an amended judgment in accordance with the order was formally entered. The district court denied the motion to alter or amend with respect to plaintiff Wilson. However, the district court did grant plaintiff Wilson a new trial. Shortly thereafter, the defendant sought and the district court denied certification under 28 U.S.C. § 1292(b).

On December 1, 1983, the defendant filed a notice of appeal from the district court's judgment in favor of plaintiff Clay only.

In response to defendant's request, the district court entered, on April 2, 1984, a "Second Amended Judgment" which included the express determination required by Fed. R. Civ. P. 54(b) for the immediate appeal of an otherwise interlocutory judgment. No appeal was taken from the April 2 judgment. The threshold question is whether we have appellate jurisdiction.

Several things are clear. When defendant's notice of appeal was filed on December 1, 1983, there was no final judgment. Further, the entry of the district court's "Second Amended Judgment" on April 2, 1984, did not serve to make the November 15, 1983, judgment final for purposes of appellate jurisdiction. A.O. Smith Corp. v. Sims Consolidated, Ltd., 647 F.2d 118 (10th Cir. 1981). It is well settled that all appellate jurisdictional requirements must be satisfied when the notice of appeal is filed. Lamp v. Andrus, 657 F.2d 1167 (10th Cir. 1981). *See* 10th Cir. R. 17(b).

We conclude that the judgment from which defendant seeks review became final on April 2, 1984. However, de-

fendant neglected or failed to file a notice of appeal from that judgment. Consequently, the notice of appeal filed December 1, 1983, was ineffective to vest this court with appellate jurisdiction. Accordingly, this appeal must be dismissed for lack of jurisdiction.

APPEAL DISMISSED.

The mandate shall issue forthwith.

HOWARD K. PHILLIPS, Clerk

By /s/ Robert L. Hoecker
Chief Deputy Clerk

———o———

SEPTEMBER TERM—October 31, 1984

Before Honorable James E. Barrett, Honorable Monroe G. McKay and Honorable James K. Logan, Circuit Judges

No. 83- 2584

CHARLOTTE LOUISE WILSON, et al.,

Plaintiffs-Appellees.

vs.

BURLINGTON NORTHERN RAILROAD COMPANY,

Defendant-Appellant.

This matter comes on for consideration of appellant's petition for rehearing filed in the captioned cause.

Upon consideration whereof, the petition is denied.

HOWARD K. PHILLIPS, Clerk

By /s/ Robert L. Hoecker
Chief Deputy Clerk

———o———

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 81-C-1385

CHARLOTTE LOUISE WILSON, individually, as Personal Representative of the Estate of Darold Floyd Wilson, and as Guardian of Jolene Kay Wilson, Craig Allen Wilson, and Jerry Todd Wilson; and GAIL L. CLAY, individually, as Personal Representative of the Estate of Norman Lee Clay, and as Guardian of Kari Lynn Clay and Boyd Lee Clay,

Plaintiffs,

v.

BURLINGTON NORTHERN RAILROAD COMPANY, a Delaware Corporation,

Defendant.

JUDGMENT

(Filed June 10, 1983)

This action came on for trial to the Court and a Jury, the Honorable Jim R. Carrigan, United States District Judge, presiding; the issues having been duly tried and the jury having reached a determination on a special verdict finding that the defendant, Burlington Northern Railroad Company, was negligent, and that its negligence caused or contributed to the deaths of both Darold Floyd Wilson and Norman Lee Clay, and further

That the decedents Wilson and Clay were guilty of contributory negligence, and that each decedent's negligence caused or contributed to his own death and, when expressed as a percentage, was 75% of the total of his own negligence and the defendant railroad's negligence (that total being 100%), and further

That the amount of damages, before any reduction for decedent Wilson's contributory negligence, which will fairly and adequately compensate Charlotte Louise Wilson for her claim arising out of her husband's death is $1,000,192.00; and further

That the total damages sustained by the plaintiff, Charlotte Louise Wilson, after having been reduced by the percentage of decedent Wilson's contributory negligence, is $250,048.00; and further

That the amount of damages, before any reduction for decedent Clay's contributory negligence, which will fairly and adequately compensate Gail L. Clay for her claim arising out of her husband's death is $690,046.00, and further

That the total damages sustained by the plaintiff, Gail L. Clay, after having been reduced by the percentage of decedent Clay's contributory negligence, is $172,510.00; and therefore, it is

ORDERED AND ADJUDGED that the plaintiff, Charlotte Louise Wilson, have and recover of the defendant, Burlington Northern Railroad Company, the sum of $250,048.00, together with interest, at the legal rate of 8.80% per annum, and costs to be taxed upon the filing of a Bill of Costs, and it is further

ORDERED AND ADJUDGED that the plaintiff, Gail L. Clay, have and recover of the defendant, Burlington Northern Railroad Company, the sum of $172,510.00, together with interest, at the legal rate of 8.80% per annum, and costs to be taxed upon the filing of a Bill of Costs. The Bills of Costs are to be filed with the Clerk of this Court within 10 days after entry of this judgment.

Dated at Denver, Colorado, this 10th day of June, 1983.

FOR THE COURT:

JAMES R. MANSPEAKER, Clerk

By: /s/ Stephen P. Ehrlich
Chief Deputy Clerk

APPROVED AS TO FORM:

/s/ Jim R. Carrigan
Judge United States District Court

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 81-C-1385

CHARLOTTE WILSON, et al.,

Plaintiffs,

v.

BURLINGTON NORTHERN RAILROAD,

Defendant.

ORDER

Following a jury verdict for the plaintiffs which reduced their recovery by 75% for contributory negligence, the plaintiffs have filed a motion asking:

1) That I amend the judgment to remove the 75% damage reduction imposed by the jury for contributory negligence.

2) That, in the alternative, I grant a new trial.

Both parties have fully briefed this motion and I have reviewed my detailed trial notes of the evidence. Exten-

sive oral argument on issues raised by these post-trial motoins has been heard. Unfortunately a hea y backlog of cases precludes my taking time to write an opinion on these motions. It appears more important to get them decided so that the case can progress.

I. *Motion to Amend Judgment.*

As to the plaintiff Gail L. Clay, whose husband Norman Clay, was the brakeman, plaintiff's counsel timely objected to all evidence and instructions touching on contributory negligence as to him. The thrust of the claimed contributory negligence was that the engineer proceeded, on a very dark and rainy night, across a ravine where the railroad bridge had been washed out by a flash flood.

The asserted contributory negligence of Clay was that he should have taken over control of the train from the engineer, Wilson, and applied the brakes when Wilson did not do so. The railroad relied upon its rules governing train crews as giving rise to such a duty. There was no evidence whatsoever that Clay either knew, or should have known of any danger ahead on the track which would have justified such extraordinary action. In effect, the railroad's position is that the brakeman, Clay, was required by the rules to mutiny in order to seize control of the train from Wilson, the engineer.

Upon reviewing my notes of the evidence, and having fully considered the briefs of both parties on this issue, I have concluded that it was error to submit to the jury the issue of contributory negligence as to Clay. There simply was no evidence admitted to support a finding that he was negligent in any manner which could have contributed to cause the accident.

The motion to amend the judgment as to the plaintiff Gail L. Clay's claim is granted and it is ordered that judgment be entered in her favor for the full $690,046.00 awarded by the jury, plus interest and costs.

My review of the evidence indicates that there was evidence from which the jury could have found negligence of Wilson which might have contributed to cause the two deaths. Wilson, as engineer, had a duty to look ahead and reasonably exercise his immediate control of the train's speed, taking prevailing weather conditions into account, so as to avoid running over the washed out bridge. For that reason, therefore, the Motion to Amend Judgment is denied as to the plaintiff Charlotte Louise Wilson.

II. *Motion for New Trial.*

Plaintiffs have moved, in the alternative, for a new trial. They assert, in support of this motion, that the evidence cannot support the jury's finding of 75% contributory negligence against both plaintiffs and that "obviously perjured" testimony of two employees of the defendant railroad denied them a fair trial.

At the time of the trial it appeared obvious to me that the railroad's witness Cuccia was lying under oath. It seemed clear to me then that his assertions regarding bridge inspections were patently false. They were also contradicted to some extent by the testimony of his supervisor.

In the meantime, I have pondered frequently seeking some rational basis on which it could be possible that his testimony was true. I have discovered none. A special hearing has been held and the railroad has filed two

lengthy documents, both of which I have searched thoroughly for evidence or argument to persuade me that Cuccia was telling the truth. I have found none. His testimony is inherently incredible and I find and conclude that he purposefully lied at the trial in order to help his employer of thirty-one years, the railroad. I base this finding on my observations of this witness as he testified at the trial, as buttressed by the inherent inconsistency and impossibility of his testimony.

Furthermore, I find and conclude that Cuccia's testimony was not the most critical testimony in the case on the issue of the railroad's negligence. Before they could apportion negligence between the railroad and the plaintiff's decedents, the jury had to decide to what extent the railroad was negligent. Without this perjured testimony, and the similarly suspect testimony of the railroad's employee Replinger, there would have been no evidence that the bridge which washed out was inspected or maintained for a substantial period of time before the wash-out. Thus the proportion of negligence assignable to the respective parties under the comparative negligence doctrine would have been quite different without the perjured testimony.

Clearly, however, the perjury did not affect the jury's decision as to liability. The railroad was found liable in spite of it, and there is no reason for putting the plaintiffs to the trouble and expense of re-trying the liability issue because of false testimony by a railroad employee.

I find and conclude that the jury's verdict as to damages was tainted by perjury of at least one railroad employee. Both plaintiffs are, therefore, entitled to a new trial on the issue of damages, including the proportional

attribution of damages to the railroad and to each plaintiff.

Defendant Clay has an option to accept either a new trial on these issues or the verdict peviously awarded, as amended, subject, of course, to the railroad's right of appeal.

Dated at Denver, Colorado, November 14, 1983.

BY THE COURT:
/s/ Jim R. Carrigan

JUDGE UNITED STATES
DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
JUDGE JIM R. CARRIGAN

CERTIFICATE OF MAILING

I certify that I mailed a true and correct copy of the Order signed by Judge Carrigan on November 14, 1983, to:

Gregory R. Piche, Esq.
1400 Holly Sugar Building
Colorado Springs, CO 80903

John L. Pilon, Esq.
1900 Executive Tower
1405 Curtis St.
Denver, Colorado 80202

/s/ Jane Carver Tuxl
Secretary/Deputy Clerk
Date: November 14, 1983
Re: 81-C-1385

—o—

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 81-C-1385

CHARLOTTE LOUISE WILSON, individually, as Personal Representative of the Estate of Darold Floyd Wilson, and as Guardian of Jolene Kay Wilson, Craig Allen Wilson, and Jerry Todd Wilson; and GAIL L. CLAY, individually, as Personal Representative of the Estate of Norman Lee Clay, and as Guardian of Kari Lynn Clay and Boyd Lee Clay,

Plaintiffs,

v.

BURLINGTON NORTHERN RAILROAD COMPANY, a corporation,

Defendant.

AMENDED JUDGMENT

(Filed November 15, 1983)

Pursuant to and in accordance with the Order entered by The Honorable Jim R. Carrigan, District Judge, on November 14, 1983, it is

ORDERED AND ADJUDGED that the plaintiff, Charlotte Louise Wilson, have and recover of the defendant, Burlington Northern Railroad Company, the sum of $250,048.00, together with interest, at the legal rate of 8.80% per annum, and costs to be taxed upon the filing of a Bill of Costs, and it is

FURTHER ORDERED that the plaintiff, Gail L. Clay, have and recover of the defendant, Burlington Northern Railroad Company, the sum of $690,046.00, together with interest, at the legal rate of 8.80% per annum, and costs to be taxed upon the filing of a Bill of Costs.

The Bills of Costs are to be filed with the Clerk of this Court within 10 days after entry of this judgment.

DATED at Denver, Colorado, this 15th day of November, 1983.

FOR THE COURT:

JAMES R. MANSPEAKER,
CLERK

By: /s/ Stephen P. Ehrlich
Chief Deputy Clerk

---

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 81-C-1385

CHARLOTTE LOUISE WILSON, individually, and as Personal Representative of the Estate of Darold Floyd Wilson, etc.; and GAIL L. CLAY, individually, as Personal Representative of the Estate of Norman Lee Clay, etc.,

Plaintiff,

v.

BURLINGTON NORTHERN RAILROAD COMPANY, a corporation,

Defendant.

NOTICE OF APPEAL

(Filed December 1, 1983)

TO: THE CLERK OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO AND THE PLAINTIFF, GAIL L. CLAY, AND PLAINTIFF'S COUNSEL OF RECORD

PLEASE TAKE NOTICE that the defendant, Burlington Northern Railroad Company, will appeal to the

United States Court of Appeals for the Tenth Circuit from the Court's ruling of November 14, 1983, and the Order and Judgment pursuant thereto, granting Plaintiff's Motion to Amend the Judgment as to the plaintiff Gail L. Clay.

DATED this 1st day of December, 1983.

/s/ John L. Pilon
C. William Kraft, III
John L. Pilon
James P. Gatlin
Attorney for Defendant
1800 Executive Tower
1405 Curtis Street
Denver, Colorado 80202
Telephone: 458-4446

———o———

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 81-C-1385

CHARLOTTE LOUISE WILSON, individually, as Personal Representative of the Estate of Darold Floyd Wilson, and as Guardian of Jolene Kay Wilson, Craig Allen Wilson, and Jerry Todd Wilson; and GAIL L. CLAY, individually, as Personal Representative of the Estate of Norman Lee Clay, and as Guardian of Kari Lynn Clay and Boyd Lee Clay,

Plaintiffs,

v.

BURLINGTON NORTHERN RAILROAD COMPANY, a Delaware Corporation,

Defendant.

MOTION FOR ENTRY OF FINAL JUDGMENT

(Filed December 19, 1983)

Defendant, Burlington Northern Railroad Company, pursuant to Rule 54 (b) Fed. R. Civ. Pro. moves the Court to direct the entry of a final judgment as to Gail L. Clay.

In support of this Motion, defendant states as follows:

1. An amended judgment in favor of Gail L. Clay was entered November 15, 1983.

2. Defendant wishes to appeal that judgment directly in the United States Court of Appeals for the Tenth Circuit.

3. Defendant believes there is no just reason for delay in the entry of a final judgment in this matter.

Wherefore, defendant requests that the Court designate the amended judgment entered on November 15, 1983 as a final judgment pursuant to Rule 54(b) Fed. R. Civ. Pro.

Respectfully submitted,

/s/ James P. Gatlin
John L. Pilon
James P. Gatlin
Attorneys for
Defendant/Appellant
1800 Executive Tower
1405 Curtis Street
Denver, Colorado 80202
Telephone: 458-4445

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT
OFFICE OF THE CLERK
C404 UNITED STATES COURTHOUSE
DENVER, COLORADO 80294

March 20, 1984

HOWARD K. PHILLIPS
CLERK

TELEPHONE
303-837-3151
832-6021

Mr. C. William Kraft, III
Mr. John L. Pilon
Mr. James P. Gatlin
1800 Executive Tower
1405 Curtis Street
Suite 1800
Denver, CO 80202

Mr. Richard W. Hanes
Spurgeon, Haney & Howbert
1400 Holly Sugar Building
Colorado Springs, CO 80903

Re: *83-2584, Wilson, et al. v. Burlington Northern RR Company*

Dear Counsel:

This Court has today assigned the captioned case to Calendar C, pursuant to Tenth Circuit Rule 10, as revised on March 12, 1980. The Court is considering summary dismissal of this case for the reason that the Court may lack jurisdiction over it.

Within fifteen (15) days of this date, the parties may simultaneously file with the Clerk memorandum briefs in quadruplicate in support of their respective positions. The memoranda should contain proof of service showing the names and addresses of persons or entities served and

may contain citations to relevant legal authorities. *These memoranda should specifically address the question set forth at the bottom of this page.*

Any party may include in his memorandum a statement setting forth reasons why, in his opinion, oral argument should be heard. The memoranda and the trial court record will be reviewed by a panel of three judges. If the three judges unanimously determine that oral argument is not needed, the case will be submitted for determination without oral argument. No further briefs should be filed until further notice from the Court.

Sincerely yours,

HOWARD K. PHILLIPS, Clerk

By /s/ Kathleen T. Clifford
Deputy Clerk
Appeals Expediter

QUESTION TO BE ADDRESSED:

Whether the November 15, 1983 Amended Judgment is final for purposes of appeal? *See* Rule 54(b), Fed.R. CivP.; *Golden Villa Spa, Inc. v. Health Industries, Inc.*, 549 F.2d 1363 (10th Cir. 1977).

cc: James Manspeaker, Clerk, U.S. District Court, Room C-145, United States Courthouse, Denver, CO 80294 (D.Ct. #81-C-1385)

———o———

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 81-C-1385

CHARLOTTE LOUISE WILSON, et al.,

Plaintiffs,

v.

BURLINGTON NORTHERN RAILROAD COMPANY,

Defendant.

ORDER

(Filed March 29, 1984)

In this Federal Employer's Liability Act case, several post-trial motions are pending with regard to the judgment entered in favor of the plaintiff Gail Clay against the defendant Burlington Northern Railroad Company. These motions have been thoroughly briefed, and oral argument would not materially assist in deciding them.

Plaintiff has requested that I award pre-judgment interest, but has cited no persuasive authority supporting such an award. For this reason, I decline to award her pre-judgment interest. That motion is denied.

Plaintiff also has requested that I award post-judgment interest on the full amount of the amended judgment from the date the original judgment was entered. Defendant objects to this proposed award. Since my decision to amend the judgment simply removed the effect of the comparative negligence diminution of Clay's award, it held that she is entitled to the full amount of damages found by the jury. Post-judgment interest should accrue on the full amount of $690,046.00 from the date of the initial judgment, June 10, 1983. My order dated November 14, 1983, which restored the full amount of the jury verdict, should have indicated that the amended judgment be entered *nunc pro tunc* to June 10, 1983. Pursuant to Fed. R. Civ. P 60(a), I now order that the judgment entered November 15, 1983 be amended to reflect that such judgment was to be effective *nunc pro tunc* to June 10, 1983.

Therefore, the Clerk of the Court shall enter an amended judgment in favor of the plaintiff Clay and against the defendant in the amount of $690,046.00, *nunc pro tunc* to June 10, 1983. Interest at the applicable rate shall accrue from June 10, 1983 on the full amount of the judgment.

Plaintiff also has requested that I require that any supersedeas bond filed by the defendant in support of a Fed. R. Civ. P. 62(d) stay be in an amount sufficient to cover the full amount of the judgment as well as any interest awarded. Of course, under Rule 62(d) no stay is effective until I approve the bond. In order to expedite matters, I will now state that I will not approve any supersedeas bond unless it is sufficient to secure the full amount of the $690,046.00 judgment, plus interest at the statutory rate from June 10, 1983 until March 31, 1986. The Court of Appeals' crowded docket, together with recent statements by the Chief Justice of the United States describing the increasing work load of the Courts of Appeals, indicate that the prudent course is to estimate two years on appeal.

Finally, the parties have submitted cross-motions for Fed. R. Civ. P. 54(b) certification of the plaintiff Clay's judgment against the defendant. Pursuant to that rule, I find that there is no just reason for delay and I direct the Clerk of the Court to enter as a final judgment the amended judgment specified in this order. The parties may pursue an appeal from this final amended judgment.

Dated at Denver, Colorado, March 29, 1984.

BY THE COURT:
/s/ Jim R. Carrigan
JUDGE UNITED STATES
DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
JUDGE JIM R. CARRIGAN

CERTIFICATE OF MAILING

I certify that I mailed a true and correct copy of the Order signed by Judge Carrigan on March 29, 1984, to:

Gregory R. Piche, Esq.
1400 Holly Sugar Building
Colorado Springs, CO 80903
John M. Pilon, Esq.
1405 Curtis St.
Denver, CO 80202

/s/ (Illegible)
Secretary/Deputy Clerk
Date: March 29, 1984
Re: 81-C-1385

———o———

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 81-C-1385

CHARLOTTE LOUISE WILSON, individually, as Personal Representative of the Estate of Darold Floyd Wilson, and as Guardian of Jolene Kay Wilson, Craig Allen Wilson, and Jerry Todd Wilson; and GAIL L. CLAY, individually, as Personal Representative of the Estate of Norman Lee Clay, and as Guardian of Kari Lynn Clay and Boyd Lee Clay,

Plaintiffs,

v.

BURLINGTON NORTHERN RAILROAD COMPANY, a corporation,

Defendant.

## SECOND AMENDED JUDGMENT AS TO PLAINTIFF GAIL L. CLAY

(Filed April 2, 1984)

Pursuant to and in accordance with the Order entered by the Honorable Jim R. Carrigan, District Judge, on November 14, 1983 and the Order entered by The Honorable Jim R. Carrigan, District Judge, on March 29, 1984, wherein the Court has found no just reason for delay pursuant to Rule 54(b) of the Federal Rules of Civil Procedure, it is

ORDERED AND ADJUDGED that the plaintiff Gail L. Clay shall have and recover from the defendant Burlington Northern Railroad Company the sum of $690,-046.00 plus interest from June 10, 1983 at the legal rate of 9.59% per annum, and costs to be taxed upon the filing of a Bill of Costs with the Clerk of this Court within 10 days after the entry of this judgment.

DATED at Denver, Colorado this 2nd day of April, 1984.

FOR THE COURT:

JAMES R. MANSPEAKER,
CLERK

By: /s/ Stephen P. Ehrlich,
Chief Deputy Clerk

ENTERED ON THE DOCKET

APRIL 2, 1984

JAMES R. MANSPEAKER,
CLERK

By.....

———o———

UNITED STATES DISTRICT COURT
OFFICE OF THE CLERK
DISTRICT OF COLORADO
JAMES R. MANSPEAKER, CLERK

ROOM 145
UNITED STATES COURTHOUSE
DENVER, COLORADO 80202

April 2, 1984

Gregory R. Piche, Esq.
1400 Holly Sugar Building
Colorado Springs, CO 80903

James Gatlin, Esq.
John L. Pilon, Esq.
1405 Curtis St., Suite 1800
Denver, CO 80202

Re: Civil Action No. 81-C-1385

Please find enclosed a copy of the Second Amended Judgment as to Plaintiff Gail L. Clay dated April 2, 1984 entered by the Clerk in the above referenced matter.

JAMES R. MANSPEAKER, Clerk

By: /s/ (Illegible)
Deputy Clerk

———o———

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

Case No. 83-2584

GAIL L. CLAY, individually, as Personal Representative of the Estate of Norman Lee Clay and as Guardian of Karl Lynn Clay and Boyd Lee Clay,

Plaintiff-Appellee,

v.

BURLINGTON NORTHERN RAILROAD COMPANY, a Delaware corporation,

Defendant/Appellant.

# APPELLANT'S MEMORANDUM BRIEF IN OPPOSITION TO SUMMARY DISMISSAL

(Filed April 3, 1984)

Appellant, Burlington Northern Railroad Company, submits the following Memorandum Brief in Opposition to Summary Dismissal of the above-captioned appeal.

Pursuant to motions filed by defendant-appellant Burlington Northern Railroad on December 19, 1983, and plaintiff-appellee Gail L. Clay on February 3, 1984, the United States District Court, in its attached Order dated March 29, 1984, designated its amended judgment entered November 15, 1983, as a final judgment for purposes of appeal pursuant to Rule 54(b), Fed. R. Civ. P. The Court's Order is attached as Exhibit A. The corrected final judgment issued April 2, 1984, is attached hereto as Exhibit B.

Respectfully submitted,

/s/ C. William Kraft, III
John L. Pilon
James P. Gatlin
Attorney for Defendant
1800 Executive Tower
1405 Curtis Street
Denver, Colorado, 80202
Telephone: 458-4540

CERTIFICATE OF SERVICE

I hereby certify that on the 3rd day of April, 1984, a true and correct copy of the foregoing APPELLANT'S MEMORANDUM BRIEF IN OPPOSITION TO SUMMARY DISMISSAL was placed in the United States Mails, postage properly prepaid, and addressed to: Gregory R. Piche, Esq., 1400 Holly Sugar Bulding, Colorado Springs, Colorado 80903.

/s/ (Illegible)